

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JAMES LIGHTNER,

Plaintiff,

v.

COUNTY OF CONTRA COSTA; DEPUTY DAVID
CUSHMAN, in his individual capacity;
DEPUTY J. PATZER, in his individual
capacity; DEPUTY J. VORHAUER, in his
individual capacity,

Defendants.

No. C 09-2043 CW

ORDER GRANTING IN
PART AND DENYING IN
PART DEFENDANTS'
MOTION TO DISMISS
(Docket No. 14)

Defendants County of Contra Costa and Deputies Cushman, Patzer and Vorhauer move to dismiss Plaintiff James Lightner's civil rights action for failure to state a claim. Plaintiff opposes the motion. The motion was taken under submission on the papers. Having considered all the papers submitted by the parties, the Court GRANTS in part Defendants' Motion to Dismiss and DENIES it in part.

BACKGROUND

This action arises from Plaintiff's allegations that Defendants violated his civil rights. In May, 2007, Defendants

1 Cushman, Patzer and Vorhauer entered Plaintiff's residence to
2 arrest him for a parole violation. Plaintiff maintains that, while
3 Deputies Patzer and Vorhauer had restrained him with his face down
4 on the floor and his hands behind his back, Deputy Cushman released
5 a police dog and commanded it to attack him. The dog bit
6 Plaintiff, allegedly causing injury that required medical care.
7 Plaintiff maintains that the individual Defendants did not provide
8 him with access to medical treatment.

9 Plaintiff asserts that he did not resist or attempt to evade
10 arrest and that he did not pose an imminent threat of death or
11 serious bodily injury. He claims that Deputy Cushman was not
12 justified in releasing the dog. Plaintiff attributes Deputy
13 Cushman's alleged use of excessive force to a purported failure of
14 the County to provide adequate training.

15 Based on the events leading to his arrest, Plaintiff was
16 charged with resisting arrest in violation of California Penal Code
17 section 69.¹ Defs.' Request for Judicial Notice (RJN), Ex. B.
18 Plaintiff plead nolo contendere to this charge. RJN, Exs. C-D.

19 Plaintiff brings three claims under 42 U.S.C. § 1983. Against
20 the individual Defendants,² Plaintiff asserts claims of excessive
21

22 ¹ Defendants ask the Court to take judicial notice of public
23 records relating to the arrest. Because the certified copies of
24 the felony complaint filed against Plaintiff, a Clerk's Docket and
25 Minutes from Plaintiff's criminal case and Plaintiff's Advisement
26 of Rights, Waiver and Plea Form are not subject to reasonable
dispute, the Court grants Defendants' request for judicial notice
of these documents. See Fed. R. Evid. 201. The Court denies
Defendants' request as to the reports of the deputies on the arrest
because they contain facts that are subject to reasonable dispute.

27 ² Plaintiff asserts several of his claims against "Doe
28 Officers" and "Doe Supervisors." The use of Doe defendants is not
(continued...)

1 force. As to Deputy Cushman, Plaintiff asserts a claim of failure
 2 to provide medical care. Finally, Plaintiff seeks "municipal
 3 liability for unconstitutional custom or policy" against the
 4 County. He seeks compensatory and punitive damages for his claims.

5 LEGAL STANDARD

6 A complaint must contain a "short and plain statement of the
 7 claim showing that the pleader is entitled to relief." Fed. R.
 8 Civ. P. 8(a). Dismissal under Rule 12(b)(6) for failure to state a
 9 claim is appropriate only when the complaint does not give the
 10 defendant fair notice of a legally cognizable claim and the grounds
 11 on which it rests. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555
 12 (2007). In considering whether the complaint is sufficient to
 13 state a claim, the court will take all material allegations as true
 14 and construe them in the light most favorable to the plaintiff. NL
 15 Indus., Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986).
 16 However, this principle is inapplicable to legal conclusions;
 17 "threadbare recitals of the elements of a cause of action,
 18 supported by mere conclusory statements," are not taken as true.
 19 Ashcroft v. Iqbal, ___ U.S. ___, 129 S. Ct. 1937, 1949-50 (2009)
 20 (citing Twombly, 550 U.S. at 555).

21 _____
 22 ²(...continued)

23 favored in the Ninth Circuit. See Gillespie v. Civiletti, 629 F.2d
 24 637, 642 (9th Cir. 1980). However, where the identity of alleged
 25 defendants cannot be known prior to the filing of a complaint the
 26 plaintiff should be given an opportunity through discovery to
 27 identify them. Id. Failure to afford the plaintiff such an
 28 opportunity is error. See Wakefield v. Thompson, 177 F.3d 1160,
 1163 (9th Cir. 1999). Accordingly, the Court, on its own motion,
 DISMISSES without prejudice Plaintiff's claims against the Doe
 Defendants. Should Plaintiff learn of the Doe Defendants'
 identities through discovery, he may move for leave to file an
 amended complaint to add them as named defendants. See Brass v.
County of Los Angeles, 328 F.3d 1192, 1195-98 (9th Cir. 2003).

DISCUSSION

I. Excessive Force Claim

Defendants argue that Plaintiff's excessive force claim is barred by Heck v. Humphrey, 512 U.S. 477 (1994). In Heck, the Supreme Court ruled that a plaintiff may not recover damages for "harm caused by actions whose unlawfulness would render a conviction or sentence invalid" unless he or she can prove that the conviction or sentence has been overturned, expunged or declared invalid. 512 U.S. at 486-87. The test is "whether a judgment in favor of the plaintiff would necessarily imply the invalidity of [the plaintiff's] conviction or sentence." Id. at 487.

As stated above, Plaintiff plead nolo contendere to a charge of violating California Penal Code section 69,³ which provides:

Every person who attempts, by means of any threat or violence, to deter or prevent an executive officer from performing any duty imposed upon such officer by law, or who knowingly resists, by the use of force or violence, such officer, in the performance of his duty, is punishable by a fine not exceeding ten thousand dollars (\$10,000), or by imprisonment in the state prison, or in a county jail not exceeding one year, or by both such fine and imprisonment.

A defendant cannot be convicted under section 69 "unless the officer was acting lawfully at the time the offense against the officer was committed." In re Manuel G., 16 Cal. 4th 805, 815 (1997). Defendants assert that, if Plaintiff were to prevail on his excessive force claim, this result would entail a finding that the individual Defendants acted unlawfully, which would invalidate Plaintiff's nolo contendere plea.

³ In California, a plea of nolo contendere has the same effect as a guilty plea or guilty verdict for the purposes of a Heck analysis. See Nuno v. County of San Bernardino, 58 F. Supp. 2d 1127, 1135 (C.D. Cal. 1999).

1 Plaintiff cites Smith v. City of Hemet, 394 F.3d 689, 695 (9th
2 Cir. 2005), in which the Ninth Circuit held, "In California, the
3 lawfulness of the officer's conduct is an essential element of the
4 offense of resisting, delaying or obstructing a peace officer."
5 The court ruled that, if an officer used excessive force at the
6 time of an arrest, the arrest would be unlawful and the arrestee
7 could not be convicted of resisting. Id. at 695-96. However, the
8 Smith court ruled that the defendants in that case were not
9 entitled to summary judgment under Heck because it was not clear
10 from the record whether Smith had plead guilty to resisting,
11 delaying or obstructing the officer based upon his actions during
12 his arrest (which would have triggered Heck), or based upon his
13 actions prior to his arrest when officers were attempting to
14 conduct an investigation at Smith's house and had not yet attempted
15 to detain him. Id. at 697-98.

16 At this early stage, the record is not sufficiently developed
17 for the Court to determine whether Heck bars Plaintiff's claim
18 against Deputy Cushman. As in Smith, the record does not show
19 whether the conduct for which Plaintiff was charged coincided with
20 Deputy Cushman's release of the dog. If the two correspond, Heck
21 would bar Plaintiff's claim against Deputy Cushman.

22 Defendants analogize Plaintiff's case to Truong v. Orange
23 County Sheriff's Department, in which a state appellate court
24 concluded, on a motion for judgment on the pleadings, that Heck
25 barred the plaintiff's excessive force claim. 129 Cal. App. 4th
26 1423, 1427-30 (2005). There, the plaintiff admitted that, during
27 her booking at the county jail, she initially refused to disrobe
28 and shower despite sheriff's deputies' instructions. Id. at 1425.

1 She alleged that, as she began to comply with the instructions by
2 removing her sweater, several deputies twisted her arms and struck
3 her body. Id. at 1426. Although she subsequently plead guilty to
4 a charge under California Penal Code section 148 for resisting the
5 exercise of lawful duty, the plaintiff maintained that the
6 deputies' actions were excessive because they struck her after she
7 had started to comply. Id. The state court rejected this
8 argument, concluding "that Truong's refusal to obey the lawful
9 order and the events that led to her injuries are part of an
10 unbreakable chain of events." Id. at 1429. In other words, the
11 defendants' alleged violations of the plaintiff's civil rights were
12 intertwined with the conduct that precipitated the charge against
13 her and, as a result, Heck barred her claims.

14 Here, Plaintiff's allegations, which must be taken as true on
15 this motion, do not suggest that Deputy Cushman's alleged use of
16 excessive force was necessarily part of a chain of events tied to
17 Plaintiff's resisting arrest. As stated above, he pleads that
18 Deputies Patzer and Vorhauer had already restrained him and that he
19 was in a prone position when Deputy Cushman released the dog. The
20 actions of Deputies Patzer and Vorhauer could have broken the
21 chain.

22 However, Plaintiff does not plead sufficient facts that tend
23 to show that Deputies Patzer and Vorhauer acted with excessive
24 force. He only alleges that they "fully restrained" him and that
25 "one or two of them were on top of" him. Compl. ¶ 13. This does
26 not suggest that they used excessive force. To the extent that
27 Plaintiff intends to complain that Deputies Patzer and Vorhauer
28 were involved in the release of the police dog, which could

1 constitute excessive force, he must allege factual support.
2 Currently, he simply avers that they acted "in concert with
3 Cushman" Compl. ¶ 21. Plaintiff must truthfully allege
4 facts showing that Deputies Patzer and Vorhauer were personally
5 involved in the release of the dog. See Taylor v. List, 880 F.2d
6 1040, 1045 (9th Cir. 1989) (requiring personal participation by a
7 defendant for liability to accrue under § 1983).

8 Accordingly, on this motion, the Court does not conclude that
9 Heck bars Plaintiff's excessive force claims against Deputy
10 Cushman. However, the Court dismisses with leave to amend
11 Plaintiff's claims against Deputies Patzer and Vorhauer.

12 II. Failure to Provide Medical Care

13 A claim for failure to provide medical care while in police
14 custody arises under the Due Process Clause of the Fourteenth
15 Amendment. See Carnell v. Grimm, 74 F.3d 977, 979 (9th Cir. 1996).
16 In analyzing such a claim, a court applies the same standard used
17 for claims under the Eighth Amendment for violation of a prisoner's
18 right to health care. Id. "In order to violate the Eighth
19 Amendment proscription against cruel and unusual punishment, there
20 must be a deliberate indifference to serious medical needs of" the
21 plaintiff. Lopez v. Smith, 203 F.3d 1122, 1131 (9th Cir. 2000)
22 (citation and internal quotation marks omitted). To establish
23 deliberate indifference, a plaintiff must show that the official
24 delayed, denied or intentionally interfered with medical treatment.
25 Id.

26 Plaintiff pleads sufficient facts to support his claim against
27
28

1 Deputy Cushman.⁴ Plaintiff asserts that Deputy Cushman, among
2 others, knew of his injuries, but nevertheless failed to provide
3 him with access to proper medical care. Defendants cite Shehee v.
4 Lutrell, 199 F.3d 295 (6th Cir. 1999), to argue that liability
5 under § 1983 cannot be based on a failure to act. However, Shehee
6 addressed liability against the supervisors of offending employees,
7 not the employees themselves. Id. at 300. Here, Plaintiff
8 complains that Deputy Cushman failed to provide him with medical
9 care. Because he was allegedly present when Plaintiff required
10 such care, these allegations support his claim that Deputy Cushman
11 was deliberately indifferent.

12 CONCLUSION

13 For the foregoing reasons, the Court GRANTS in part
14 Defendants' Motion to Dismiss and DENIES it in part. (Docket No.
15 14.) Plaintiff's excessive force claims against Deputies Patzer
16 and Vorhauer are dismissed with leave to amend to cure the
17 deficiencies discussed above. Defendants' motion is denied in all
18 other respects. Within twenty-one days of the date of this Order,
19 Defendants shall answer Plaintiff's claims against Deputy Cushman
20 and the County.

21 On its own motion, the Court DISMISSES all claims asserted
22 against Doe Defendants without prejudice to Plaintiff moving for
23 leave to amend his complaint at a later date to identify these
24 Defendants.

25
26 ⁴ Plaintiff brings this claim only against Deputy Cushman,
27 even though he makes allegations against Deputies Patzer and
28 Vorhauer concerning their failure to provide him with medical care.
If Plaintiff intends to assert this claim against Deputies Patzer
and Vorhauer, he must amend his complaint to reflect as much.

1 Plaintiff may file an amended complaint to cure the
2 deficiencies noted above within twenty-one days from the date of
3 this order. If Plaintiff does so, Defendants may file a motion to
4 dismiss, based on Plaintiff's new pleadings, three weeks
5 thereafter, with Plaintiff's opposition due two weeks following and
6 Defendants' reply due one week after that. If a motion to dismiss
7 is filed, it would not be fully briefed before the case management
8 conference (CMC) scheduled for April 27, 2010 at 2:00 p.m. The
9 Court accordingly continues the CMC to June 3, 2010 at 2:00 p.m.

10 IT IS SO ORDERED.

11
12 Dated: March 29, 2010



CLAUDIA WILKEN
United States District Judge